Supreme Court, U.S.
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In The

Supreme Court of the United States

STEPHEN PHILIP KELLER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas In Houston

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner's Sixth Amendment right to effective assistance of counsel was violated where that counsel failed to object or otherwise alert the trial court, prior to the court's finding the petitioner guilty, that under the facts of the case a deadly weapon finding could not be made, since all of the elements of the solicitation offense with which the petitioner had been charged had already been committed prior to the petitioner being found in possession of a deadly weapon.

LIST OF THE PARTIES

The parties to the original proceedings in the 179th District Court of Harris County, Texas, the Court of Appeals for the First District of Texas in Houston, and the Court of Criminal Appeals, were the petitioner Stephen Philip Keller and the State of Texas.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Philip Keller respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the First District of Texas in Houston, issued on October 30, 2003, the review of which was initially granted by the Court of Criminal Appeals of Texas on June 9, 2004, but then dismissed by that court on October 13, 2004, as improvidently granted.

CITATION OF OPINIONS BELOW

On October 30, 2003, the Court of Appeals for the First District of Texas in Houston issued a published opinion affirming the petitioner's conviction and four-year sentence for the offense of criminal solicitation of a minor in the 179th District Court of Harris County, Texas [*Keller v. State*, 125 S.W.3d 600 (Tex. App. – Houston [1st Dist.] 2003]; (App. 9-27). The Court of Criminal Appeals granted the petitioner's Petition for Discretionary Review on June 9, 2004. However, the petition was dismissed as improvidently granted in a *per curiam* opinion issued by the Court of Criminal Appeals on October 13, 2004 [*Keller v. State*, 146 S.W.3d 677 (Tex. Crim.App. 2004)] (App. 28).

BASIS FOR JURISDICTION

This Court's jurisdiction is invoked by the timely filing of this Petition for Writ of Certiorari within the prescribed ninety (90) days from October 13, 2004, which is the date that the state court of last resort, the Court of Criminal Appeals of Texas, dismissed the petitioner's petition for

discretionary review to that court as improvidently granted. *See* 28 U.S.C., sec. 1257(a); S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

U. S. CONST., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

SUPREME COURT RULES

S. Ct. R. 10(a): Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

S. Ct. R. 13.1: Review on Certiorari; Time for Petitioning

"1. . . . A petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is

timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

TEXAS PENAL CODE

§ 15.031. CRIMINAL SOLICITATION OF A MINOR.

"(b) A person commits an offense if, with intent that an offense under Section 21.11, 22.011, 22.021, or 43.25 be committed, the person by any means requests, commands, or attempts to induce a minor or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense under one of those sections or would make the minor or other believed by the person to be a minor a party to the commission of an offense under one of those sections."

TEXAS GOVERNMENT CODE

Section 508.145. ELIGIBILITY FOR RELEASE ON PAROLE; COMPUTATION OF PAROLE ELIGIBILITY DATE.

"(d) An inmate serving a sentence for an offense described by Section 3g(a)(1)(A), (C), (D), (E), (F), (G), or (H), Article 42.12, Code of Criminal Procedure, or for an offense for which the judgment contains an affirmative finding under Section 3g(a)(2) of that article, is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years."

TEXAS CODE OF CRIMINAL PROCEDURE

Article 42.12, section 3g(a)(2). Limitation on Judge Ordered Community Supervision

"Sec. 3g(a) The provisions of Section 3 of this article (allowing regular probation) do not apply:

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment."

STATEMENT OF THE CASE

A. History of Proceedings and Material Facts

In the spring of 2001, the petitioner placed a personal ad over the Internet seeking young males who would engage in sexual activity. After being alerted to these solicitations by an informant, Sergeant Lee Vaughan of the Texas Department of Public Safety, Special Crimes Service, responded to petitioner by e-mail, stating that his name was Brandon and that he was 13 years old. After numerous e-mails between the two, it was agreed that they would meet at Cullen Park in Houston on May 20, 2001. The petitioner arrived at the park at the appointed time. Police officers arrested him, and found that he was

carrying sex magazines, sex paraphernalia, and beer. The officers also found a loaded 12-gauge shotgun in the side passenger door of the petitioner's truck. After arresting the petitioner, police obtained a warrant to search his residence and seized his computer, which contained the e-mails which had solicited the sexual contact.

The petitioner was charged with criminal solicitation of a minor pursuant to TEX. PENAL CODE ANN., sec. 15.031(b), a second-degree felony in Texas carrying a maximum punishment of twenty (20) years in prison and a $10,000.00 fine (App. 1). On September 26, 2001, the petitioner pleaded guilty to the allegations of the indictment, which included a separate paragraph alleging that the petitioner had used a deadly weapon in the commission of the offense. The effect of an inclusion of a deadly weapon finding in the judgment in Texas is that the convicted person must then serve one-half of his sentence before becoming eligible for parole, irrespective of any good-time credits he may have earned, *See* TEX. GOV. CODE, sec. 508.145(d). The case was reset pending the completion of a presentence investigation and report. On November 28, 2001, after considering the presentence report and hearing from witnesses, the trial court found the petitioner guilty and assessed his punishment at four (4) years confinement in prison and a $10,000.00 fine (App. 2-4). The court also made an affirmative finding that a deadly weapon had been used in the offense (App. 2).

A Motion for New Trial was filed and timely amended (App. 5-8). On February 5, 2000, a hearing was held pursuant to the petitioner's motion. At the hearing, trial counsel stated that his opinion was that a deadly weapon finding could not legally be made under the facts of the case, since the crime of solicitation was already over when

the petitioner went to the park with a firearm (App. 30). However, counsel admitted that during the guilty plea proceedings, he had not made the argument to the trial court that the crime of solicitation was already completed prior to the police ever finding him with a firearm (App. 30). Counsel argued that he had brought the matter up instead at the subsequent sentencing hearing (App. 30).

The trial court denied the petitioner's motion for new trial.

B. The State Court of Appeals Decision

On appeal, the First Court of Appeals rejected the petitioner's complaint that his trial counsel was ineffective because he never argued or brought to the trial court's attention the defense to the deadly weapon allegation, namely, that under the facts of the case, a deadly weapon finding could not be made because all of the elements of the crime had already been committed:

> "Trial counsel testified at the motion for new trial hearing that he believed he told the trial court several times that appellant was not guilty of using or exhibiting the deadly weapon during the offense, but that appellant would nevertheless plead guilty to that allegation. The record of the sentencing phase of the trial does not support counsel's version of the events, but the record before us contains no reporter's record of the hearing on appellant's plea of guilty. Trial counsel's testimony may therefore refer to arguments he made during the hearing on appellant's plea of guilty to the court. Given appellant's confession to using or exhibiting a deadly weapon, along with trial counsel's recollection that he argued to

> the trial court that appellant should not be found guilty of the deadly weapon, we cannot conclude that counsel was ineffective for not arguing that the trial court should have found the deadly weapon allegation not true, particularly in light of trial counsel's and appellant's overall trial strategy that appellant accept full responsibility for the conduct so as to obtain deferred adjudication for the offense.
>
> "We conclude that appellant has not established that trial counsel was ineffective for not asserting his alleged innocence of the deadly weapon allegation after appellant pleaded guilty to the deadly weapon charge." (App. 23-24)

In holding out the possibility that trial counsel had argued the deadly weapon issue at the earlier plea proceedings, the court of appeals apparently overlooked counsel's admission at the motion for new trial hearing that he had not brought the matter of the deadly weapon up at such earlier time. (App. 30).

C. Basis of Federal Question and Jurisdiction of Supreme Court to Review State Court's Decision in Criminal Proceeding

As stated above, a motion for new trial was filed and a hearing was held pursuant to the motion, where the subject of counsel's ineffectiveness regarding the deadly weapon issue was explored and argued. Specifically, issue number five in petitioner's motion complained that "The trial court should grant a motion for new trial because trial counsel failed to adequately investigate possible legal defenses to the crime charged." The second issue in the petitioner's brief to the First Court of Appeals read:

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE TEXAS CONSTITUTION"

Counsel also cited this Court's opinion in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as basis for his argument that trial counsel rendered ineffective assistance in connection with the proceedings below, and the court of appeals recognized that counsel was making a Sixth Amendment claim, as well as his reliance on *Strickland,* in its written opinion (App. 18-19). Under his argument, petitioner specifically complained that his trial counsel did not assert his innocence of the deadly weapon finding, and invoked the above federal authority as support for his ineffective assistance of counsel claim. By misstating the record to suggest that trial counsel might have urged a defense to the deadly weapon allegation at the guilty plea proceedings, when the record from the proceedings indicates that counsel admits he did not raise the issue in the trial court at such time, and in rejecting petitioner's Sixth Amendment complaint on such grounds, the First Court of Appeals in Houston has deprived the petitioner of any meaningful review of the federal question and federal constitutional issues raised by petitioner in his appeal.

REASONS FOR GRANTING THIS PETITION

THE DECISION BELOW TO REJECT PETITIONER'S INEFFECTIVE ASSISTANCE CLAIM, WHICH WAS BASED UPON COUNSEL'S FAILURE TO RAISE THE ISSUE OF WHETHER A DEADLY WEAPON FINDING COULD LEGALLY BE MADE UNDER THE FACTS OF THE CASE, AND THE APPELLATE COURT'S REJECTION OF SUCH INEFFECTIVENESS CLAIM, WHICH WAS BASED UPON A MISREADING OF THE RECORD, WAS IN CONFLICT WITH RELEVANT PRIOR DECISIONS OF THIS COURT, VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND DEPRIVED PETITIONER OF ANY MEANINGFUL APPELLATE REVIEW OF THE FEDERAL LAW ARGUMENTS RAISED DURING THE DIRECT APPEAL OF HIS CONVICTION AND PRISON SENTENCE

A. THERE WAS NO EVIDENCE THAT A DEADLY WEAPON HAD BEEN USED IN THE SOLICITATION OFFENSE, WHICH HAD ALREADY ENDED WHEN PETITIONER WAS FOUND WITH THE WEAPON

In considering the ineffectiveness claim that petitioner presented below, it is important to stress the threshold point that the petitioner was charged only with solicitation, not with any attempted sexual act with a minor. The offense of criminal solicitation is completed when the culpable request or inducement to commit the offense in question is unilaterally presented. *McGann v.*

State, 30 S.W.3d 540, 547 (Tex.App. – Fort Worth 2000, pet.ref'd); *State v. Brinkley,* 764 S.W.2d 913 (Tex.App. – Tyler 1989, no pet.). A meeting of the minds is not even required. Unilateral guilt of solicitation may be established solely by the communication presented by the defendant, accompanied by his culpable intent and belief. *Majid v. State,* 713 S.W.2d 405, 407 (Tex.App. – El Paso 1986). There is no requirement that the state prove that the intended crime was actually committed or attempted. *Brinkley,* at 915. Thus, although the police in this instance chose to arrest the Appellant only after he had begun to act upon the correspondence between himself and "Brandon," by going to meet him at Cullen Park, they certainly were not required to wait that long. The crime of criminal solicitation of a minor was complete when the Appellant solicited his intended underage victim by e-mail. Although the overt act of going to Cullen Park with sex magazines, dildos, condoms and a firearm may have been necessary evidence for the State if they had decided to charge the Appellant with attempted sexual assault of a child or some other preparatory offense, and certainly lent strength to the State's punishment argument, it is not true to suggest that such items facilitated the commission of the solicitation offense, which had already ended long before the petitioner's arrival at the park. There was no reason that the police could not have obtained a warrant and arrested the Appellant based upon the e-mails alone.

Moreover, there is no suggestion that the Texas legislature intended that the offense of criminal solicitation of a minor be viewed a continuing offense, so that it is ongoing even after its constituent elements have been committed. As Justice Baird noted in his dissenting

opinion in *Whatley v. State*, 946 S.W.2d 73 (Tex. Crim. App. 1997):

> "Most offenses are complete when each of their elements have occurred. *Barnes v. State,* 824 S.W.2d 560, 562 (Tex.Crim.App. 1991) (citing *United States v. Smith,* 740 F.2d 734, at 736 (9th Cir. 1984)). However, some offenses are 'continuing in nature.' To determine whether an offense is continuing we utilize the rationale employed by the United States Supreme Court in *Toussie v. United States,* 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970), where the Court stated:
>
> > '. . . the doctrine of continuing offenses should be applied in only limited circumstances . . . such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion or the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one.'
>
> In *Barnes,* the State contended theft should be treated as a continuing offense. *Id.,* 824 S.W.2d at 561. Specifically, the State asked us to construe the statute so that every day a defendant exercised control over stolen property would constitute a separate offense. We refused because the explicit language of the statute did not compel such a conclusion and the nature of the offense was not such that the legislature must have intended for theft to be treated as a continuing offense. *Id.*, at 562 (citing *Toussie*). Such a judicial construction would have usurped 'the authority of the legislature in an area controlled

> exclusively by it,' *Ibid.*" *Whatley,* 946 S.W.2d at 78.

The issue of when a solicitation offense is "complete," for purposes of whether a deadly weapon finding is appropriate, was examined in *Whatley v. State,* 946 S.W.2d 73 (Tex.Crim.App. 1997). In *Whatley,* the defendant hired two men to kill a third man. On the first meeting between the defendant and the two prospective hit men, the defendant apparently paid them $700.00 and gave them a photograph of the intended victim and a map. Only three days later did the defendant provide the hit men with a weapon to be used in the offense. *Id.,* at 79. The defendant argued on appeal that at the time that he provided the weapon to the hit men, the solicitation offense had already been completed three days earlier.

The Court of Criminal Appeals rejected that argument, but in doing so seemed to be considering very different situations than are present in the instant case:

> "The offense of solicitation penalizes someone who 'requests, commands, or attempts to induce' the commission of certain offenses. Texas Penal Code sec. 15.03(a). Certainly, if a defendant pointed a gun at another person and commanded that person to engage in conduct constituting a capital or first degree felony, that defendant would have 'used or exhibited' a deadly weapon during the offense of solicitation. This same reasoning applies to a 'request' or an 'attempt to induce' except that the use of a weapon is merely persuasive rather than coercive. The persuasive impact of the weapon may be a part of the request or the attempt to induce conduct by strengthening those elements of the solicitation. The offense need not be based upon words alone.

> Hence, merely exhibiting a deadly weapon to an accomplice during a solicitation transaction may be sufficient to support a deadly weapon finding . . . especially where, as in the present case, the weapons were deadly weapons *per se*." *Id.*, at 76.

Whatley stands for the following propositions: 1) that theoretically, solicitation cases are susceptible to deadly weapon findings, but that 2) the deadly weapon must at least be exhibited to the person who is being solicited. In *Whatley,* the deadly weapon was appropriate because it was provided to the two hitmen as part and parcel of the solicitation scheme. In the words of Justice Womack, who wrote a concurring opinion, Whatley "was still requesting, commanding, or attempting to induce them to commit the murder when he introduced the handgun into the offense" *Id.,* at 77. That is, the solicitation was ongoing.

By contrast, there is no suggestion that the Appellant exhibited the weapon in this case to the person being solicited, namely, "Brandon." Indeed, it is hard to imagine how he could have done so, given that the offense was committed *via* e-mail, and that he never even met his intended victim. Arguably, a deadly weapon could have been properly included only if the Appellant had threatened its use in the e-mails themselves.

B. COUNSEL'S FAILURE TO URGE A DEFENSE TO THE DEADLY WEAPON ALLEGATION CONSTITUTED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT

It is well-established that an ineffective assistance claim has two components. An applicant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington,*

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. The United States Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

Despite the fact that the Appellant had agreed, through a pre-trial agreement with the prosecutor, to plead guilty to an indictment which included a deadly weapon finding, the trial court was still free to reject such finding, and was even obligated to do so, if the evidence was insufficient to support such a finding. In *Moon v. State*, 572 S.W.2d 681, 682 (Tex.Crim.App. 1978), the Court of Criminal Appeals pointed out that in situations involving guilty pleas before the court, a court which was presented with evidence of a defendant's innocence need not withdraw the defendant's plea (as it would be required to do in a jury trial situation), but should nevertheless take whatever steps are necessary to insure that a person is not convicted of a crime that he did not commit:

> "It is the duty of the trial court to consider the evidence submitted and as the trier of the facts the court may find the appellant guilty of a lesser offense and assess the appropriate punishment or it may find the defendant not guilty" *Id.*, at 682.

Thus, despite the fact that the Appellant had pleaded guilty to the offense of criminal solicitation of a child *and* to using a deadly weapon in the course of the offense, the

trial court was still free to refuse to make a deadly weapon finding.

Instead, the trial court did make a deadly weapon finding. Indeed, the issue of whether a deadly weapon finding was appropriate did not even come up during the sentencing hearing, as the Court of Appeals recognized. Notwithstanding the prosecutor's recollection to the contrary at the motion for new trial hearing (App. 30), defense counsel never contested the issue, nor did he object to the trial court's affirmative finding, apparently assuming that because his client had pleaded guilty to the allegation of having used a deadly weapon, that was the end of the matter.

However, absent any *sua sponte* action by the trial court in this case in not making an affirmative finding of a deadly weapon, trial counsel was ineffective in failing to bring the matter to the trial court's attention or to move that there be no finding of a deadly weapon. Counsel made no argument concerning the lack of any evidence that the Appellant had used a deadly weapon in committing the offense, nor did he cite any of the cases concerning when a solicitation case has ended. The fact that the Appellant had been put in a position of pleading guilty to an indictment which included a deadly weapon finding did not prevent trial counsel's arguing the point. Defense counsel should not have simply assumed that the subject of when the offense of criminal solicitation crime ends for purposes of whether a deadly weapon finding is appropriate was well-known to the judge or so obvious that it was not worth raising. Counsel obviously disagreed with the indictment's inclusion of a deadly weapon allegation, and was upset about the allegation being included in the indictment. However, counsel's feelings on the subject only

became known at the hearing on the motion for new trial. At no time during the sentencing hearing did counsel question the deadly weapon allegation or try to persuade the trial court to reject such an affirmative finding. Despite his client's plea, counsel could still have vociferously argued the point, even explaining to the trial court that his client had only pleaded true to secure the state's waiver of its right to a jury trial, but that in fact, there was no evidence to support the allegation.

It is hard to conjure a trial strategy which suggests *not* raising the issue of whether the Appellant was really guilty of using a deadly weapon. Candidly, the only defensive issue that was available to the defense was that no deadly weapon had been used in the offense. Once it became apparent, through the evidence in the presentence report and in the testimony that was presented at the sentencing hearing, that there was an issue as to whether a deadly weapon had been used, zealous defense counsel would have at least argued that no deadly weapon finding be made. Counsel's failure to even argue the matter of the deadly weapon finding cannot be explained by any reasonable trial strategy.

C. PETITIONER WAS DEPRIVED OF A MEANINGFUL REVIEW OF HIS INEFFECTIVE ASSISTANCE CLAIM WHERE THE COURT OF APPEALS MISCONSTRUED THE RECORD

As stated earlier, the First Court of Appeals speculated that trial counsel may have urged a defense to the deadly weapon allegation at the guilty plea proceedings, although counsel himself admitted at the motion for new trial hearing that he did not raise the issue in the trial court at such time (App. 23-24, 30). As recognized in the Court of Appeals'

opinion, counsel did not argue the matter of the deadly weapon at sentencing, despite his recollection (and the prosecutor's) that he had (App. 23). Although the Constitution does not establish a right to an appeal, when a state establishes an appellate system, as Texas has, it must be a fair system and provide for meaningful appellate review. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 606, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); *Douglas v. California,* 372 U.S. 353, 355-356, 83 S.Ct. 814, 815-816, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). Thus, the Court of Appeals, in misreading the record, has deprived the petitioner of any meaningful review of the federal law issue concerning ineffective assistance that he has raised in his appeal.

CONCLUSION

Based on the foregoing arguments and citations of authority, petitioner Stephen Philip Keller requests that this Court grant his Petition for Writ of Certiorari, and remand his case for a new trial, or in the alternative, a new punishment hearing.

Respectfully submitted this 5th day of January, 2005.

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Opinion issued October 30, 2003

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-02-00036-CR

STEPHEN PHILIP KELLER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 877848

OPINION

Appellant, Stephen Keller, pleaded guilty, without an agreed punishment recommendation from the State, to the felony offense of criminal solicitation of a minor with intent to commit aggravated sexual assault, and true to a deadly weapon allegation within the indictment. After a pre-sentence investigation (PSI) report was completed and a sentencing hearing with testimony was conducted, the trial court found appellant guilty, found the deadly weapon allegation to be true, and assessed punishment at four years' confinement in prison and a $10,000 fine. In his first issue, appellant contends that he must be granted a new trial because his plea agreement with the State was

illegal. In his second issue, appellant contends that he was denied effective assistance of counsel. In his third and fourth issues, appellant contends that the deadly weapon finding and the finding of the victims' age in the judgment must both be deleted. We affirm.

Background

Appellant placed an internet advertisement seeking young males to engage in sexual activity. A confidential informant, posing as a 14-year-old boy named "Jason," notified Sergeant Lee Vaughan of the Texas Department of Public Safety, Special Crimes Service, of the ad. Vaughan responded to the ad, stating that he was a 13-year-old boy named "Brandon." E-mail correspondence between Brandon, Jason, and appellant resulted in an agreement to perform various sexual acts with each other at Cullen Park, on May 20, 2001 at about 11:00 a.m. Appellant indicated he would be wearing a gray tee-shirt and black running shorts. Appellant arrived shortly before 11:00 a.m., wearing the clothes he described. Appellant gathered his bags, looked around, and walked to the meeting area. Appellant was arrested at the park after he remained at the meeting place for several minutes. Appellant carried with him one bag containing beer and ice, and another containing sexual paraphernalia. Appellant's truck displayed an altered license plate and a loaded, 12-gauge shotgun had been partially inserted in a storage pocket of the side passenger door. After arresting appellant, police obtained a warrant to search his residence and seized his computer. E-mails soliciting the sexual contact were recovered from the computer's stored data.

Plea Agreement

In his first point of error, appellant contends that the prosecutor's "threshold requirement that the appellant plead guilty to the deadly weapon allegation in exchange for the State's agreement to waive its right to a jury trial" was an illegal agreement under the facts of this case. Appellant contends that the State refused to waive its right to a jury trial unless appellant agreed to plead guilty to the deadly weapon allegation, of which appellant claims he is not guilty. Appellant claims that, despite his guilty plea to the deadly weapon allegation, it was legally impossible for him to be convicted of using or exhibiting a deadly weapon during the course of the solicitation offense because the offense was already completed when the weapon was recovered from his vehicle after his arrest.

To preserve a complaint for appellate review, a defendant must object timely to the trial court. TEX.R.APP. P. 33.1; *Rhoades v. State,* 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). The record shows that appellant never asked to withdraw his plea of guilty to the deadly weapon allegation. Likewise, he raised no objection to the trial court to the State's alleged requirement that he plead guilty to the deadly weapon finding as a condition of the State's waiver of its right to a jury trial. Therefore, no error was preserved for review.

We overrule appellant's first point of error.

Affirmative Finding of Deadly Weapon

In his third point of error, appellant contends that the trial court's affirmative finding of a deadly weapon should be removed from the judgment because there was "no

evidence that the appellant used or exhibited a deadly weapon during the commission of the offense." According to appellant, the offense of criminal solicitation was already complete when police officers found the firearm inside appellant's vehicle after his arrest at the park. Appellant claims that, despite his plea of guilty to using or exhibiting the deadly weapon, the trial court was "under an obligation" to refuse to make an affirmative finding of a deadly weapon.

Appellant's underlying contention is that the evidence is "legally and factually insufficient" to support the deadly weapon finding. Appellant cites no authority, however, to explain how this Court should apply a legal and factual sufficiency review to a situation in which a defendant has pleaded guilty to the trial court. Before addressing appellant's sufficiency complaint, we must first determine the standard of review that applies.

Texas has a procedural requirement that differs from most jurisdictions. Pursuant to article 1.15 of the Code of Criminal Procedure, the State must offer sufficient proof to support any judgment based on a guilty or nolo contendere plea in a felony case tried to the court.[1] TEX. CRIM. PROC. CODE ANN. art. 1.15 (Vernon 2001); *Ex Parte*

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[1] Pleas of guilty to a jury are treated differently than pleas of guilty to a court under the Code of Criminal Procedure and need not be supported by evidence. TEX. CRIM. PROC. CODE ANN. art. 1.15. A defendant who pleads guilty to a felony offense before a jury admits all elements of the offense and waives his right to challenge the legal and factual sufficiency of the evidence. *Turnipseed v. State*, 609 S.W.2d 798, 800-01 (Tex. Crim. App. [Panel Op.] 1980); *Simpson v. State*, 67 S.W.3d 327, 329 (Tex. App. – Texarkana 2001, no pet.) (citing *Ex Parte Martin*, 747 S.W.2d 789, 792 (Tex. Crim. App. 1988)); *Addicks v. State*, 15 S.W.3d 608, 612 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd).

Williams, 703 S.W.2d 674, 678 (Tex. Crim. App. 1986). The State must "introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." TEX. CRIM. PROC. CODE ANN. art. 1.15.

Reviewing the sufficiency of the evidence to support a judgment under article 1.15 upon a plea of guilty or nolo contendere, however, requires that we apply a different standard of review than when we review legal sufficiency under *Jackson v. Virginia*[2] and factual sufficiency under *Johnson v. State*[3] for convictions that follow a guilty plea. Legal-sufficiency-review analysis under *Jackson* applies only when the federal constitution places the burden on the prosecution to establish guilt beyond a reasonable doubt. *Ex Parte Williams,* 703 S.W.2d at 682 (citing *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709 (1969)). The *Jackson* standard does not apply when a defendant knowingly, intelligently and voluntarily enters a plea of guilty

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[2] A challenge to the legal sufficiency of the evidence to support a criminal conviction questions whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89 (1979); *King v. State,* 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

[3] When reviewing the factual sufficiency of evidence, we examine all the evidence neutrally and ask whether proof of guilt is so obviously weak as to undermine confidence in the fact finder's determination or so greatly outweighed by contrary proof as to indicate that a manifest injustice has occurred. *See Johnson v. State,* 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

or nolo contendere. *Ex Parte Williams,* 703 S.W.2d at 682. There is no federal constitutional requirement that a guilty plea in a state criminal prosecution must be corroborated by evidence of guilt, and *Jackson*[4] does not apply. *Ex Parte Williams,* 703 S.W.2d at 682. A plea of guilty waives all non-jurisdictional defenses, including challenges to the sufficiency of the evidence. *Id.* Similarly, a defendant who pleads guilty to the court by executing a valid judicial confession waives any challenge to the factual sufficiency of the evidence. *Ybarra v. State,* 960 S.W.2d 742, 745 (Tex. App. – Dallas 1997, no pet.).

We conclude that appellant has waived the right to challenge the legal and factual sufficiency of the evidence to sustain his conviction under *Jackson,* 443 U.S. at 318-19, 99 S. Ct. at 2788-89, and *Johnson,* 23 S.W.3d at 11. Our "sufficiency" review on appeal of felony pleas of guilty to the court is confined to determining whether sufficient evidence supports the judgment of guilt under article 1.15 of the Code of Criminal Procedure. *See* TEX. CRIM. PROC. CODE ANN. art. 1.15.

Appellant pleaded guilty to the last paragraph of the indictment, thus confessing that he used or exhibited a deadly weapon, namely a firearm, in the commission of the offense of criminal solicitation of a minor. Appellant read and signed a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" that contained the following statement: "I understand the above allegations and I confess that they are true. . . . " The record establishes that appellant freely, intentionally, knowingly, and voluntarily confessed to using or exhibiting the deadly

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[4] *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781 (1979).

weapon during the commission of the offense. A presumption of truthfulness and regularity applies to documents filed in the trial court. *Breazeale v. State,* 683 S.W.2d 446, 450 (Tex. Crim. App. 1984). Appellant's judicial confession is sufficient evidence to show that he used a deadly weapon, and the record need not otherwise provide proof. *See Alexander,* 868 S.W.2d at 361 (citing *Ex Parte Franklin,* 757 S.W.2d 778, 784 (Tex. Crim. App. 1988)); *see also Hunt v. State,* 967 S.W.2d 917, 919 (Tex. App. – Beaumont 1998, no pet.). We conclude that appellant's stipulation of guilt and judicial confession are sufficient evidence to support the judgment under Article 1.15 of the Code of Criminal Procedure.

Appellant also argues that the trial court was under an "obligation" to refuse to accept his plea of guilty (or true) to the deadly-weapon allegation because the evidence established that the offense was already completed when the weapon was discovered.

A trial court sitting as the trier-of-fact has a duty to consider the evidence and may, despite a defendant's plea of guilty, find a defendant guilty as charged, guilty of a lesser-included offense, or not guilty. *Moon v. State,* 572 S.W.2d 681, 682 (Tex. Crim. App. 1978); *Solis v. State,* 945 S.W.2d 300, 302-03 (Tex. App. – Houston [1st Dist.] 1997, pet. ref'd). Appellant argues that, because the trial court was presented with evidence that indicated appellant had not used a deadly weapon during the course of the offense of solicitation, the trial court had no option but to refuse to make an affirmative finding of a deadly weapon. Appellant's contention, however, ignores that his judicial confession was sufficient evidence upon which the trial court

could base its affirmative finding of a deadly weapon. *See Alexander,* 868 S.W.2d at 361.

We overrule appellant's third point of error.

Affirmative Finding of Age of Victim

In his fourth point of error, appellant contends that the judgment in the case must be modified to delete the trial court's affirmative finding that the victim was under 17 years of age because the finding has no relevance to the offense.

At the close of the sentencing hearing the following dialog occurred:

THE COURT: In Cause No. 877848, you shall be confined not less than two years nor more than four years in accordance with the laws governing the Institutional Division of the Texas Department of Criminal Justice. You will receive credit for time served.

There will be an affirmative finding that a deadly weapon, namely, a firearm, was used in the commission of the offense.

THE STATE: Judge, I ask for one more affirmative finding pursuant to 62.12 and that's an affirmative finding that the intended complainant was younger than 17.

THE COURT: There will be such a finding.

DEFENSE: Your Honor, you asked if [appellant] wanted to address you and he does.

THE COURT: All right.

(The sentencing hearing proceeded with appellant making a statement to the court.)

We conclude appellant has waived the right to complain about the affirmative finding in the judgment. To preserve a complaint for appellate review, a party must have presented a timely request, objection, or motion stating specific grounds for the ruling desired. TEX.R.APP. P. 33.1; *Rhoades v. State,* 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). Under these circumstances, because the trial court made the affirmative finding in open court during sentencing, appellant had the opportunity to object to the court's affirmative finding. The record shows that appellant did not timely object to the affirmative finding.

We overrule appellant's fourth point of error.

Ineffective Assistance of Counsel

In his second point of error, appellant contends that he was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution because his trial counsel (1) did not move to dismiss the indictment, (2) did not argue that the evidence was insufficient to support the deadly weapon allegation, and (3) did not provide effective counsel based on the totality of representation.

The trial court heard testimony solely from appellant's trial counsel at the hearing on appellant's motion for new trial alleging ineffective assistance of counsel. The grant

or denial of a motion for new trial is a matter entirely within the trial court's discretion and will not be reversed unless the trial court abused its discretion. *State v. Gonzalez,* 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). An abuse of discretion occurs when the trial court's decision is so clearly wrong as to lie outside the zone of reasonable disagreement. *Cantu v. State,* 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). At a hearing on a motion for new trial, the trial court is the sole judge of witness credibility. *See Lewis v. State,* 911 S.W.2d 1, 7 (Tex. Crim. App. 1995).

The standard for evaluating ineffective assistance of counsel claims is set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Hernandez v. State,* 726 S.W.2d 53, 55 (Tex. Crim. App. 1986); *Gamble v. State,* 916 S.W.2d 92, 93 (Tex. App. – Houston [1st Dist.] 1996, no pet.). To be entitled to a new trial based on ineffective assistance, an appellant must show that (1) counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment, and that (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064; *Gamble,* 916 S.W.2d at 93. In determining whether the *Strickland* test has been met, we measure counsel's performance on the totality of the representation afforded, not on individual alleged errors. *See Ex parte Welborn,* 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). The constitutional right to counsel does not mean errorless counsel or counsel whose competency is judged by hindsight. *Doherty v. State,* 781 S.W.2d 439, 441 (Tex. App. – Houston [1st Dist.] 1989, no pet.).

The defendant bears the burden to prove ineffective assistance of counsel. *Strickland,* 466 U.S. at 687, 104

S. Ct. at 2064; *Gamble,* 916 S.W.2d at 93. A defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2064; *Gamble* 916 S.W.2d at 93. A claim of ineffective assistance of counsel must be firmly supported in the record. *McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The Indictment

Appellant contends that he received ineffective assistance because trial counsel did not move to dismiss the indictment. According to appellant, his trial counsel should have filed a motion to quash the indictment because a portion of the indictment incorrectly inserted Officer Lee Vaughan's name for appellant's. Appellant argues that, if the court had ruled on a motion to quash, appellant's indictment would have been dismissed, or at a minimum, the State would have been more likely to plea bargain with appellant if challenged with a motion to quash.

Appellant's indictment alleged that, " . . . with intent that aggravated sexual assault be committed, the Defendant requested, commanded, and attempted to induce Lee Vaughan, known to the defendant as Brandon, a person believed to be younger than seventeen years of age, to engage in specific conduct, that, *under the circumstances surrounding the conduct of Lee Vaughan, known to the Defendant as Brandon,* as the Defendant believed them to be, would constitute the offense of aggravated sexual assault. . . . " The Penal Code, however, requires that the circumstances surrounding the conduct refer to the actor

or the defendant, not the alleged victim. TEX. PENAL CODE ANN. § 15.031(b) (Vernon 2003). Thus, appellant argues, the indictment was properly subject to a motion to quash. *See Robinson v. State,* 764 S.W.2d 367, 370-71 (Tex. App. – Dallas 1989, pet. ref'd).

Although subject to a motion to quash, an indictment containing this type of pleading error is not fundamentally defective for charging purposes because it contains all of the elements of the offense of criminal solicitation. *See Robinson,* 764 S.W.2d at 371. A matter of form or substance in an indictment may be amended if the substantial rights of a defendant are not prejudiced and if the amendment does not allege an additional or different offense. TEX. CRIM. PROC. CODE ANN. art. 28.10 (Vernon 2001). Thus, the State could have simply moved to amend the indictment in response to a motion to quash. *See id.*

The hearing on the motion for new trial produced no evidence to explain why trial counsel did not seek dismissal of the indictment. Furthermore, nothing in the record suggests that the defect in the indictment would have benefitted appellant by making the State more amendable to a plea bargain or to drop the deadly weapon allegation from the indictment. Appellant has not established that he would have prevailed on a motion to dismiss, given that the indictment contained all the elements of the offense of criminal solicitation and could have been amended to correct the pleading error. *See Robinson,* 764 S.W.2d at 371; *see also* TEX. CRIM. PROC. CODE ANN. art. 28.10. To establish ineffective assistance of counsel for failure to file a motion with the court, a defendant must demonstrate that he would have succeeded on the motion. *Jackson v. State,* 973 S.W.2d 954, 957 (Tex. Crim. App. 1998).

The record reflects that counsel's overall trial strategy was to plead guilty to the indictment as written to avoid a jury trial, "reach out" to the judge, and "accept responsibility" so as to avoid a final conviction for the offense and obtain deferred adjudication. The record does not provide reasons to explain counsel's decision beyond his above stated strategy and we will not speculate. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994); *Henderson,* 29 S.W.3d 616, 624 (Tex. App. – Houston [1st Dist.] 2000, pet. ref'd) (holding trial counsel was not ineffective when the record was silent as to trial counsel's reasons for declining to request instruction on concurrent causation).

We conclude appellant has not established ineffective assistance of counsel for failure to file a motion to dismiss the indictment.

The Deadly Weapon Finding

Appellant contends that he received ineffective assistance because trial counsel did not challenge the sufficiency of the evidence to support the deadly weapon allegation in the indictment. Appellant claims that his trial counsel should have raised the issue that, despite appellant's plea of guilty to the charge, appellant was not guilty of the deadly weapon allegation. A trial court, however, has the discretion to find a defendant not guilty or guilty of a lesser offense, despite a defendant's guilty plea to the charged offense. *Brown v. State,* 11 S.W.3d 360, 363 (Tex. App. – Houston [1st Dist.] 2000, pet. ref'd). The record establishes that trial counsel explained to appellant that the only way he could receive deferred adjudication was from the trial court upon a plea of guilty. Furthermore, the record establishes that, according to appellant's

trial counsel, the State was unwilling to waive its right to a jury trial unless appellant pled guilty to all the charges, including the deadly weapon allegation. The record further establishes that, although the trial court admonished appellant of his right to a jury trial, appellant voluntarily, intentionally, and knowingly waived his right to a jury trial by pleading guilty and confessing to all charges.

Trial counsel testified at the motion for new trial hearing that he believed he told the trial court several times that appellant was not guilty of using or exhibiting the deadly weapon during the offense, but that appellant would nevertheless plead guilty to that allegation. The record of the sentencing phase of the trial does not support counsel's version of the events, but the record before us contains no reporter's record of the hearing on appellant's plea of guilty. Trial counsel's testimony may therefore refer to arguments he made during the hearing on appellant's plea of guilty to the court. Given appellant's confession to using or exhibiting a deadly weapon, along with trial counsel's recollection that he argued to the trial court that appellant should be found not guilty of the deadly weapon allegation, we cannot conclude that counsel was ineffective for not arguing that the trial court should have found the deadly weapon allegation not true, particularly in light of trial counsel's and appellant's overall trial strategy that appellant accept full responsibility for the conduct so as to obtain deferred adjudication for the offense.

We conclude that appellant has not established that trial counsel was ineffective for not asserting his alleged innocence of the deadly weapon allegation after appellant pleaded guilty to the deadly weapon charge.

The Totality of the Representation

Appellant contends that he received ineffective assistance because trial counsel (1) signed and allowed appellant to sign admonishments stating that the term of his sex-offender registration would be life when the correct time frame was 10 years, (2) did not object to the affirmative finding of the age of the intended victim in the judgment, (3) did not discuss the possibility of a jury trial with appellant, (4) advised appellant that he had to plead true to the deadly weapon allegation, even though appellant denied using a weapon, and (5) stated that he did not think appellant was eligible for probation from a jury.

Appellant has not established that the outcome of the proceedings would have been different if he had been properly admonished that he must register as a sex offender for the lesser term of 10 years instead of life. Likewise, even if trial counsel's lack of objection to the trial court's affirmative finding on the age of the victim were error, appellant concedes in his fourth point of error that no harm resulted from including that finding. Appellant contends only that the finding "could" in the future mistakenly affect how long appellant must register as a sex offender. The record exhibits somewhat conflicting testimony regarding trial counsel's discussions with appellant about the right to trial by jury and whether a jury could or could not assess probation, and therefore, does not firmly establish that counsel was ineffective. As to appellant's contention that trial counsel informed appellant that he had to plead guilty to the deadly weapon allegation, the record indicates that counsel did not advise appellant that he was categorically required to plead guilty to the deadly weapon allegation. Rather, trial counsel explained to appellant that, in order for the State

to agree to waive a jury trial, he had to plead guilty to the indictment as written. According to appellant's trial counsel, appellant wanted to avoid a jury trial "at all costs," sought deferred adjudication from the court, and therefore chose to plead guilty to the indictment as written.

The record reflects that trial counsel met and discussed the case with appellant over the course of his representation, called three witnesses at the sentencing hearing, cross-examined the State's three witnesses, entered a favorable polygraph examination into evidence, and made a closing statement on behalf of his client. We note further that appellant was assessed four years' confinement, when the trial court could have assessed punishment at up to 20 years' confinement.

We conclude that appellant has not established that his counsel was ineffective based on the totality of his representation of appellant.

We overrule appellant's second point of error.

Judgment Modification to Identify Deadly Weapon as a Firearm

The State asserts a cross-point of error contending that the judgment must be modified to specify that the deadly weapon was a firearm. Based on the plain language of section 3g(a)(2) of article 42.12 of the Code of Criminal Procedure, along with the apparent interpretation of that language in dictum by the Court of Criminal Appeals, we agree that, in cases in which the deadly weapon is a firearm, section 3g(a)(2) of article 42.12 requires that the deadly-weapon finding not only recite that a deadly

weapon was used or exhibited, but that the weapon was a firearm. *Whatley v. State,* 946 S.W.2d 73, 76 n.3 (Tex. Crim. App. 1997); *Cobb v. State,* 95 S.W.3d 664, 667-68 (Tex. App. – Houston [1st Dist.] 2002, no pet.). We modify the judgment to add to the deadly-weapon affirmative finding that the weapon was a firearm.

Conclusion

We modify the judgment to designate that the deadly weapon used in the commission of the offense was a firearm, and, as modified, we affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justice Keyes and Alcala.

Publish. TEX. R. APP. P. 47.4.

IN THE 179TH DISTRICT COURT

INDICTMENT

(Filed August 23, 2001)

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, **STEPHEN PHILIP KELLER**, hereafter styled the Defendant, on or about **May 20, 2001**, did then and there unlawfully, with intent that the offense of aggravated sexual assault be committed, the Defendant requested, commanded and attempted to induce LEE VAUGHAN, KNOWN TO THE DEFENDANT AS BRANDON, a PERSON THE DEFENDANT BELIEVED TO BE YOUNGER THAN SEVENTEEN YEARS OF AGE, to engage in specific conduct that, under the circumstances surrounding the conduct of LEE VAUGHAN, KNOWN TO THE DEFENDANT AS BRANDON, as the Defendant believed them to be, would CONSTITUTE THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT, namely, FOR LEE VAUGHN, KNOWN TO THE DEFENDANT AS BRANDON, TO ALLOW THE DEFENDANT TO CAUSE THE MOUTH OF THE DEFENDANT TO CONTACT THE ANUS OF LEE VAUGHAN, KNOWN TO DEFENDANT AS BRANDON, A PERSON WHOM THE DEFENDANT BELIEVED TO BE YOUNGER THAN FOURTEEN YEARS OF AGE AND NOT THE SPOUSE OF THE DEFENDANT.

It is further presented that at the time the defendant committed the felony offense of CRIMINAL SOLICITATION OF A MINOR on or about May 20, 2001, as hereinabove alleged, he used and exhibited a deadly weapon,

namely, A FIREARM, during the commission of and during the immediate flight therefrom.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/
Foreman of the Grand Jury

JUDGMENT ON PLEA OF GUILTY/NOLO CONTENDERE/NOT GUILTY BEFORE COURT-WAIVER OF JURY TRIAL
(Filed November 28, 2001)

CAUSE NO. 877848

THE STATE OF TEXAS VS. STEPHEN PHILIP KELLER	IN THE 179th DISTRICT COURT

Date of Judgment:	Date Sentence Imposed:	Sentence to Begin:	Date of Offense:
11/28/01	11/28/01	11/28/01	5/20/01

Attorney for State: Mike Trent

Attorney for Defendant: James Butler

Offense Convicted of: Criminal Solicitation of a Minor
A Felony, Degree 2nd

Terms of Plea Bargain (in Detail): PSI

Plea to Enhancement Paragraph(s)	1st Paragraph:	2nd Paragraph	Charging Instrument:
	True	N/A	Indictment

Findings on Paragraph(s)	1st Paragraph:	2nd Paragraph	
	True	N/A	Plea: Guilty

Affirmative Findings:

Deadly Weapon:	Family Violence:	Victim Selected by Bias/Prejudice:	Victim Younger Than 17 Years:
Yes	N/A	N/A	Yes

Controlled Substance
Used to Commit Crime: N/A

Punishment Imposed
And Place of Confinement:

4 yrs, Institutional Division, TDCJ
Fine in the Amount of $10,000

Time credited: 2 days toward incarceration Court Costs: $211.25

This cause being called for trial, in Harris County, Texas, unless otherwise referenced, the State appeared by her District Attorney as named above and the defendant named above appeared in person with Counsel as named above, or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court and both parties announced ready for trial. The defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea, the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted found the defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and answered nothing in bar thereof. The Court proceeded in the presence of the defendant to pronounce sentence against the Defendant.

IT IS ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date

indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of At. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ, for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or state jail Division. The defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail, that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail as required by law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the

Defendant is ordered to immediately proceed to the office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law, or as indicated above.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that his sentence runs concurrently with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on 11-28-01

/s/
M. Wilkinson
JUDGE PRESIDING

Notice of Appeal: DEC. 18, 2001

Cause No. 0877, 848

THE STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
v.	§	**HARRIS COUNTY, TEXAS**
STEPHEN PHILIP KELLER	§	**179th JUDICIAL DISTRICT**

AMENDED MOTION FOR NEW TRIAL

(Filed Dec. 28, 2001)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW **STEPHEN PHILIP KELLER**, Defendant herein, by and through his attorney of record, Mike DeGeurin, and files this **Amended Motion for New Trial**, and in support thereof would respectfully show this Honorable Court as follows:

1. On or about November 28, 2001, defendant Stephen Philip Keller was sentenced to a four year term in the Texas Department of Criminal Justice, Institutional Division for the offense of criminal solicitation of a minor. This motion for new trial is filed within thirty days of the trial court's imposition of sentence and is thus timely.

2. The trial court should grant a motion for new trial because the judgment and sentence is contrary to the law and the evidence.

3. The trial court should grant a motion for new trial because trial counsel introduced into evidence irrelevant and inadmissible evidence which was highly prejudicial and inflammatory.

4. The trial court should grant a motion for new trial because trial counsel failed to object to irrelevant and inadmissible E-mails which were highly prejudicial and inflammatory.

5. The trial court should grant a motion for new trial because trial counsel failed to adequately investigate possible legal defenses to the crime charged.

6. The trial court should grant a motion for new trial because trial counsel failed to conduct an adequate investigation to discover possible defenses and mitigating circumstances to the crime charged.

7. The defendant's guilty plea was not knowing, voluntary and intelligent. The defendant waived his right to jury trial and entered a plea of guilty based on the advice that he had received from his retained counsel. The legal advice defendant received, however, was incorrect and not in accordance with the law. Counsel had advised defendant, prior to defendant waiving his right to a jury trial, that the defendant could not receive probation from the jury because of the deadly weapon allegation. Counsel told defendant that because of the deadly weapon allegation, defendant's only chance for probation was if he pleaded guilty to the indictment and the Judge granted him deferred adjudication. Additionally, counsel told defendant that the prosecutor had said he had included the deadly weapon allegation solely so that the defendant would serve more time if the defendant later violated the conditions of his probation. Defendant believed the legal advice his retained counsel gave him even though the advice was an incorrect statement of the law. The defendant waived his right to a jury trial and entered a plea to the indictment because

of the incorrect legal advice from his lawyer. His waiver was thus invalid.

8. The trial court should grant a motion for new trial because the facts do not support a guilty plea to the allegation that the defendant used and exhibited a deadly weapon.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays the Court set this Motion for hearing and thereafter enter an order granting a new trial in the above styled cause.

Respectfully submitted,

FOREMAN, DeGEURIN, NUGENT & GERGER

/s/ Mike DeGeurin

Mike DeGeurin
Attorney for Defendant
909 Fannin Suite 590
Houston, Texas 77010
(713) 655-9000
State Bar No. 05637500

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared **STEPHEN PHILIP KELLER**, who after having been by me first duly sworn, upon his oath deposes and says:

My name is **STEPHEN PHILIP KELLER**. I am the Defendant in the above styled and numbered causes.

I have read the foregoing **Amended Motion for New Trial** and swear that all the allegations of fact contained therein are true and correct.

/s/ Stephen P. Keller
STEPHEN PHILIP KELLER

SUBSCRIBED and SWORN to before me on this the 28th day of December, 2001

/s/ Magdalena Padilla
Notary Public
in and for Harris County, Texas
My Commission Expires

[SEAL] MAGDALENA PADILLA MY COMMISSION EXPIRES October 27, 2002

CERTIFICATE OF SERVICE

I, Mike DeGeurin, hereby certify that a true and correct copy of the above and foregoing Amended Motion for New Trial has been personally served upon the Office of the District Attorney of Harris County, Texas on this the 28th day of December, 2001

/s/ Mike DeGeurin
Mike DeGeurin

[LOGO]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 1971-03

STEPHEN PHILIP KELLER, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY

Per curiam.

OPINION

Appellant was convicted of criminal solicitation of a minor with a deadly weapon. He was sentenced to four years in prison and a $10,000 fine. The Court of Appeals affirmed. *Keller v. State*, 125 S.W.3d 600 (Tex. App. – Houston [1st Dist.] 2003).

We granted discretionary review to address whether the plea agreement was illegal. We have determined that our decision to grant review was improvident. Therefore, the petition is dismissed.

DATE DELIVERED: October 13, 2004

PUBLISH

REPORTER'S RECORD
VOLUME 1 of 3 VOLUMES
TRIAL COURT CAUSE 877848

THE STATE OF TEXAS	*	IN THE 179TH DISTRICT
VS.	*	COURT OF
STEPHEN PHILIP KELLER	*	HARRIS COUNTY
	*	JUDICIAL DISTRICT

PROCEEDINGS

(Filed Nov. 8, 2002)

[Motion For New Trial]

On the 5th day of February, 2000, the following proceedings came on to be heard in the above entitled and numbered cause before the Honorable Michael Wilkinson, Judge Presiding, 179th District Court, held in Houston, Harris County, Texas, to wit:

Proceedings reported by computerized stenotype machine.

* * *

[24] Q. (By Mr. Degeurin) No. What you told Mr. Keller, the reason for the weapon's allegation?

A. [James Butler] What the reason was because, when I explained to him that they're alleging that he used or exhibited a deadly weapon during the course of the commission of the crime.

Q. And you didn't believe that was true, though, did you?

A. I did not believe – I mean, I don't know how the Court might have ruled. We talked about this at your office, under Patterson and cases like it, they're kind of fast and lose with use or exhibit, I didn't believe it was used or exhibited, based upon what I saw. It was a fact issue from – the Judge had the right. I believed if he heard the evidence to not firmly find that.

Q. And Mr. Keller told you he did not use or exhibit a deadly weapon, did he?

[25] A. He told me he had the shot gun in his car.

Q. Did he tell you he did not use or exhibit a deadly weapon?

A. Yes.

Q. Okay.

A. Yes.

Q. He told you he was not guilty of that allegation, didn't he?

A. He told me that he did not – yes, that he did not use it or exhibit it, that he didn't.

* * *

[58] Q. And did you ever tell the Judge, he's not guilty of the second paragraph but we are pleading guilty to it anyway?

A. No.

Q. Did they offer any evidence, other than his plea of guilty that you advised him to do that he exhibited or used a gun in the solicitation on his computer of sex?

A. From his computer, no.

Q. Isn't that where the crime was?

A. My opinion, yes. They offered evidence about when he appeared at the scene.

* * *

[74] Q. Did you still feel like you had the opportunity to argue at sentencing, that is a plea of true was not supported by the evidence?

A. I felt that I did.

Q. And did you do so?

A. Yes.

Q. I mean, probably to my own amazement, didn't you argue that he should find it not true despite his plea of true. Is that right?

A. Yes.

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